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CIVIL LIBERTIES FOR HOMOSEXUALS: THE LAW IN LIMBO

Kenneth Lasson*

What in some is called liberty, in others is called license.
—Quintillian (*Institutio Oratoria*)

I. INTRODUCTION

Once rarely addressed except by psychiatrists and academics,¹ the issue of homosexual rights today is commonly found in local elections, parent-teacher association meetings, corporate board deliberations, daily news reporting, and a variety of other milieus.² Unfortunately, though, recognition of the taboo has not always served to clarify the pertinent moral and legal questions.

This past Term the United States Supreme Court itself uttered a landmark nondecision about the civil liberties of homosexuals when, by a four-to-four vote, it automatically affirmed a confusing lower court opinion on the subject.³ The Court's current reluctance to promulgate policy in this area has been almost palpable.⁴

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1. See generally J. LAURITSENT & D. THORSTAD, *THE EARLY HOMOSEXUAL RIGHTS MOVEMENT (1864-1935)* (1974); JEREMY BENTHAM'S *ESSAY ADVOCATING DECRIMINALIZATION OF SODOMY* (1785), cited in 3 J. HOMOSEXUALITY 309 (1978).

2. See, e.g., N.Y. Times, May 28, 1978, § 1, at 36, col. 3.

3. *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270 (10th Cir. 1984), *aff'd mem.*, 105 S. Ct. 1858 (1985) (4-4 decision). Justice Lewis F. Powell, Jr. did not participate, there was no written opinion on the decision, and the positions of the eight voting justices were not identified. See *infra* notes 165-78 and accompanying text. See also N.Y. Times, Mar. 27, 1985, § 1, at 9, col. 1.

4. In *New York v. Uplinger*, 104 S. Ct. 2332 (1984), the Court ruled that certiorari had been improperly granted and refused to address the constitutionality of a New York statute prohibiting loitering with intent to commit sodomy. The Court did note, however, that the parties raised "important constitutional issues." *Id.* at 2333 (defendant argued that the statute was vague and overbroad on its face, and, as applied, violated the first amendment, equal protection, and due process). *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), affirmed without opinion the lower court decision upholding the constitutionality of Virginia's sodomy laws. See *infra* notes 70-74 and accompanying text.

Also this past Term, the Court refused to hear an appeal by an Ohio high school guidance counselor who had been dismissed after telling her coworkers that she was bisexual. *Rowland v. Mad River Local School Dist.*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1373 (1985).

Thus in most states homosexual activity remains condemned as a crime,⁵ but there is a growing public and political sentiment toward regarding the condition as something that should be treated—or tolerated.⁶ Many states go even further, asserting that one's sexual preference must be fully respected and that, provided there is no imposition of one's proclivity upon others, it should neither inhibit employment nor impinge upon one's rights to free speech and free association.⁷ Is this view the enlightened opinion of legal scholars and social scientists, or merely the biased predilection of "libertarians" and homosexuals themselves?

In the past few years, several hundred cases have been reported and substantial legislation enacted regarding the constitutional rights of homosexuals.⁸ Regardless of whether the judiciary or the legislature

5. See ALA. CODE § 13A-6-63-64 (1982); ARIZ. REV. STAT. ANN. §§ 13-1411-12 (1978 & Supp. 1984-1985); ARK. STAT. ANN. § 41-1813 (1977); D.C. CODE ANN. § 22-3502 (1981); FLA. STAT. ANN. § 800.02 (West 1976); GA. CODE ANN. § 16-6-2 (1984); IDAHO CODE § 18-6605 (1979); KAN. STAT. ANN. § 21-3505 (1981); KY. REV. STAT. ANN. § 510.100 (Baldwin 1978); LA. REV. STAT. ANN. §§ 14:89-.1 (West 1974 & Supp. 1985); MD. CODE ANN. art. 27, §§ 553-554 (1982 & Supp. 1984); MASS. GEN. LAWS ANN. ch. 272, §§ 34-35 (West 1970); MICH. COMP. LAWS ANN. §§ 750.158, 750.338-.338a (West 1968); MINN. STAT. ANN. § 609.293 (West Supp. 1984); MISS. CODE ANN. § 97-29-59 (1973); MO. ANN. STAT. § 566.090 (Vernon 1979); MONT. CODE ANN. § 45-5-505 (1983); NEV. REV. STAT. § 210.190 (1979); N.Y. PENAL LAW § 130.38 (McKinney 1975); N.C. GEN. STAT. § 14-177 (1981); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); 18 PA. CONS. STAT. ANN. § 3124 (Purdon 1983); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1977); TENN. CODE ANN. § 39-2-612 (1982); TEX. PENAL CODE ANN. § 21.06 (Vernon 1974); UTAH CODE ANN. § 76-5-403 (1978 & Supp. 1983); VA. CODE § 18.12-361 (1982); WIS. STAT. ANN. § 944.17 (West 1982 & Supp. 1984-1985).

6. Boggan, *Recommendation and Report to the House of Delegates by the Section of Individual Rights and Responsibilities Concerning Consenting Adult Sexual Conduct*, 4 HUM. RTS. 67 (1974); MODEL PENAL CODE § 207.5(1), Comment (Tent. Draft No. 4, 1955). All of the preceding authorities have recommended the abolition of criminal penalties for consenting homosexual acts. See generally E. BERGLER, *HOMOSEXUALITY: DISEASE OR WAY OF LIFE?* (1971); A. BRYANT, *THE ANITA BRYANT STORY* (1977); T. LA HAYE, *THE UNHAPPY GAYS* (1978). Most states, however, routinely inflict criminal punishments on consenting homosexual adults. See *supra* note 5.

7. In California, the so-called gay rights movement has gone a step beyond by asserting the right to proselytize. The city of San Francisco actively recruits homosexual police officers: See *Balt. Sun*, May 8, 1979, at B1, col. 5.

8. In three states, the sodomy statutes have been judicially declared unconstitutional. *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982) (Texas Penal Code § 21.0 declared unconstitutional as it violated right to privacy and equal protection), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984), *reh'g en banc granted*, 743 F.2d 236 (Jan. 25, 1985); *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980) (New York sodomy statute unconstitutional as it denied equal protection and violated constitutional right to privacy), *cert. denied*, 451 U.S. 987 (1981); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980) (voluntary deviated sexual intercourse statute exceeded valid bounds of police power and infringed right to equal protection).

See generally Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties* (Part I), 10 U. DAYTON L. REV. (1985); Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980-81) [hereinafter cited as Rivera, *Sexual Preference*]; Comment, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 TOL. L. REV. 811 (1984).

is the appropriate body to deal with such rights, the proposition that reform in this area has been long overdue is supported by both constitutional and extra-constitutional arguments,⁹ and has been recognized by various courts¹⁰ and state lawmakers,¹¹ the American Law Institute (ALI),¹² and the American Bar Association.¹³ Nevertheless, judicial opinions are widely variegated, falling generally into two groups: those which look upon homosexuals as a group entitled to all the traditional liberties,¹⁴ and those which view homosexuals as either sick or immoral.¹⁵

Much has been made of the fact that Kinsey, in his landmark study of male sexuality,¹⁶ found that thirty-seven percent of the total male population had at least some overt homosexual experience between adolescence and old age, and that as many as eighteen percent of males had at least as much homosexual as heterosexual experience in their backgrounds.¹⁷ But a great many people, perhaps the majority, reject the idea that homosexuality is "normal."

9. Note, *Expanding the Right of Sexual Privacy*, 27 LOY. L. REV. 1279, 1297 (1981). Nonconstitutional reasons mandate the decriminalization of consensual sodomy statutes which render it criminal to expose and share in sexual love. Such statutes deny homosexuals the dignity of identifying themselves as persons or equal citizens. *Id.* at 1299. See Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 635-37 (1980). See generally Richards, *Unnatural Acts and the Constitutional Right of Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281, 1332 (1977). These prohibitions have had a negative impact on many homosexuals, resulting in damage to their self-respect.

Another consequence of these laws is to legitimize and support disabilities which homosexuals experience in other areas such as employment and service in the armed forces. See *infra* notes 180-250 and accompanying text. See generally Rivera, *Sexual Preference*, *supra* note 8, at 311; Note, *supra* note 9, at 1299.

10. *Baker*, 553 F. Supp. at 1121; *Onofre*, 51 N.Y.2d at 476, 415 N.E.2d at 936, 434 N.Y.S.2d at 947; *Bonadio*, 490 Pa. at 91, 415 A.2d at 47.

11. For a compilation of the states which have decriminalized consensual sodomy, see Comment, *supra* note 8.

12. See MODEL PENAL CODE § 207.5 Comment (Tent. Draft No. 4 1955). The ALI's recommendation was officially adopted in MODEL PENAL CODE § 213.2 Comment (Proposed Official Draft 1962).

13. In 1973, the American Bar Association adopted a resolution which recommended the decriminalization of private, consensual, sodomitic behavior among adults. Boggan, *supra* note 6, at 67. See G. MUELLER, *SEXUAL CONDUCT AND THE LAW* 60 (2d ed. 1980); Note, *supra* note 9, at 1297.

14. See *Acanfora v. Board of Educ.*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 936 (1974). See generally Knutson, *The Civil Liberties of Gay Persons*, 2 J. HOMOSEXUALITY 337, 339-40 (1977).

15. Knutson, *supra* note 14, at 339-40.

16. A. KINSEY, W. POMEROY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948) [hereinafter cited as KINSEY & POMEROY].

17. *Id.* at 650. Dr. Pomeroy has more recently stated that on a scale of 0 to 6 (0 being exclusively heterosexuality and 6 being exclusively homosexuality), 46% of human males and 28% of females are 1 or higher. *Matthews v. Marsh*, No. 82-0216 P32 (D. Me. Apr. 3, 1984) (citing testimony of Dr. Pomeroy), *appeal docketed*, No. 82-0216 (1st Cir. 1984).

This article will examine the recent surge in litigation arising from assertions by homosexuals of their constitutional rights—cases that reflect the law in flux and conflict—and will demonstrate that both constitutional principles and social philosophy generally require resolution of the conflicts in favor of equality, without regard to sexual preference.¹⁸

II. BACKGROUND

In its simplest terms, homosexuality is generally defined as the sexual desire for members of one's own sex. But homosexuals are not necessarily pederasts,¹⁹ transsexuals,²⁰ or transvestites.²¹ Discarding the theory that homosexuality is a communicable "disease"²² or that it is a result of environmental pressure, recent research suggests that the condition is programmed in the first years of life and that its genesis is hormonal in nature.²³ In most jurisdictions one has the right to be homosexual,²⁴ but he or she²⁵ has no right to participate in homosexual activity. Most of society will not accept participation in homosexual activity because, historically, it has been considered "unnatural."²⁶

18. Many other Western nations have removed legal prohibitions on sodomy between consenting adults in private, e.g., Belgium, East and West Germany, Spain, Italy, Turkey, England, Wales, Hungary, Switzerland, and Canada. The United States and the Soviet Union are the only major countries in Europe and North America still criminalizing such conduct. See Comment, *supra* note 8, at 867 n.362.

19. The term pederasts refers to older men who are interested in younger boys.

20. The term transsexuals refers to persons who exhibit gender confusion and appear to be uncomfortable with their respective sex roles.

21. The term transvestites refers to persons who are primarily heterosexual, but who derive pleasure from dressing as members of the opposite sex. See generally KINSEY & POMEROY, *supra* note 16, at 620-66. See also W. MASTERS & V. JOHNSON, *HOMOSEXUALITY IN PERSPECTIVE* (1979).

22. The American Psychiatric Association no longer classifies homosexual as a mental disease. See N.Y. Times, Apr. 9, 1974, at 12, col. 4.

23. Money, *Gender-Transposition Theory and Homosexual Genesis*, 10 J. SEX & MENTAL THERAPY 75 (1984); Ward & Weis, *Maternal Stress Alters Plasma Testosterone in Fetal Males*, 207 SCIENCE 328-329 (1980); Ward, *Prenatal Stress Feminizes and Demasculinizes the Behavior of Males*, 175 SCIENCE 82-84 (1972). See generally Comment, *supra* note 8, at 849 n.248 and accompanying text.

24. Under the Constitution, persons cannot be punished for physical traits over which they lack control. *Robinson v. California*, 370 U.S. 660 (1962) (reversing conviction based on defendant's status as narcotic addict).

25. The writer notes that in most jurisdictions female homosexuality—lesbianism—is legal. See statutes cited *supra* note 5. But see *United States v. Cozart*, 321 A.2d 342 (D.C. Cir. 1974) (sodomy also includes cunnilingus); Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 UCLA L. REV. 581, 597 n.54 (1967).

26. See *infra* note 269 and accompanying text. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 187 (1920) ("It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid have vanished long since, and the rule simply persists from blind imitation of the

The earliest association of homosexuality with the term "unnatural" can be found in Plato's *Laws*.²⁷ Although Plato himself was thought to be a homosexual,²⁸ he firmly maintained that sexual relations between men are unnatural because they undermine the development of desired masculine traits, such as courage and self-control.²⁹ Plato's belief was reflected in the early Judeo-Christian belief that male sexuality has as its only purpose procreation within marriage.³⁰

The concept that homosexuality must be considered a perversion can be traced to the Old Testament, where it is written: "If a man also lieth with mankind as he lie with a woman, both of them have committed an abomination: they shall surely be put to death; their blood *shall be upon them*."³¹ Such religious condemnation of homosexuality became the rationale for the none-too-subtle bias of a number of legal scholars. Among them was Blackstone, who obliquely defined the homosexual act as an "infamous *crime against nature*, committed either with man or beast . . . the very mention of which is a disgrace to human nature."³² Blackstone concluded that the proper punishment for the crime was death, preferably by burning.³³ The crime of homosexuality was originally within the sole province of the ecclesiastical court; the first English statute was enacted in 1533.³⁴

past.").

27. PLATO, *THE LAWS*, Book VIII 835-(d)-42(a), *reprinted in* T. PANGLE, *THE LAWS OF PLATO* 226-34 (1980).

28. In a letter to an American mother, Freud wrote:

Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respected individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo de Vinci, etc.). It is a great injustice to persecute homosexuality as a crime, and cruelty too.

LETTERS TO SIGMUND FREUD (1873-1939) 419-20 (E. Freud ed. 1961).

29. PLATO, *supra* note 27. Implicit in this notion is the idea that homosexuality degrades men to the status of women, which most other Greek philosophers also found shameful. *Id.*

30. *Id.* See also Richards, *supra* note 9, at 1293-94.

31. *Leviticus* 20:13: See also *Genesis* 19:4-12 (recounting the fall of Sodom and Gomorrah); Goodie, *Sodomy in Ecclesiastical Law and Theory*, 1 J. HOMOSEXUALITY 427 (1976). But cf. O.W. HOLMES *supra* note 26.

32. 4 W. BLACKSTONE, *COMMENTARIES* *215, (emphasis in original). See generally *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

33. 4 W. BLACKSTONE, *supra* note 32, at *216. Blackstone traces the historical origin of such punishment to biblical times, observing that the

voice of nature and of reason, and the express law of God, determined [sodomy] to be capital. Of which we have a single instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is a universal, not merely a provincial, precept.

Id. (footnote omitted).

34. 25 Hen. 8, ch. 6 (repealed by 9 Geo. 4, ch. 31 [1828]). See also W. BARNETT, *SEXUAL*

Prior to 1961, all fifty states regarded consensual sodomy as a criminal offense. In that year, Illinois adopted the American Law Institute's Model Penal Code resolution which recommended the decriminalization of consensual sodomy.³⁵ Today, twenty-six jurisdictions still have sodomy statutes which criminalize sexual activity in one form or another.³⁶ Although Blackstone's characterization of sodomy remains in use in several American jurisdictions,³⁷ constitutional objections to the vagueness of the term "unnatural," as used in criminal statutes, have led to greater specificity in criminal codes.³⁸ No statute limits the criminality of the act to unconsented activity, however, and none requires the publicity necessary for a common law fornication indictment. Thus, the remaining sodomy laws authorize prosecution of purely private acts.³⁹

III. THE RIGHT TO PRIVACY

A. *Griswold through Roe to Doe and Beyond*

The concept of a guaranteed right to privacy was first seriously contemplated in 1890 in a famous law review article by Samuel D. Warren and Louis D. Brandeis.⁴⁰ This right was judicially applied as early as 1902 in the context of civil torts. Since then, it has been frequently invoked, both by statute and through case law.⁴¹

The theory of a *constitutional* right to privacy, however, is of far more recent vintage. Prior to 1965, privacy had never been regarded as an independent constitutional right—perhaps simply because the word "privacy" appears nowhere in the Constitution.⁴² Nevertheless, in *Gris-*

FREEDOM AND THE CONSTITUTION 80 (1973).

35. See *supra* note 12 and accompanying text. See also Note, *supra* note 9, at 1281.

36. See statutes cited *supra* note 5. See also Comment, *supra* note 8.

37. See, e.g., MASS. GEN. LAWS ANN. ch. 272, § 34 (West 1970).

38. The Supreme Court has twice upheld state sodomy laws against vagueness challenges. *Rose v. Locke*, 423 U.S. 48 (1975) (per curiam); *Wainwright v. Stone*, 414 U.S. 21 (1973) (per curiam). The few successful vagueness challenges have not created substantive rights and have left the legislature free to enact a more specific statute. See, e.g., *Harris v. State*, 457 P.2d 638 (Alaska 1969); *Franklin v. State*, 257 So. 2d 21 (Fla. 1971); *State v. Sharpe*, 1 Ohio App. 2d 425, 205 N.E.2d 113 (1965) (per curiam).

39. See Comment, *supra* note 8.

40. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

41. See *Roberson v. Rochester Folding-Box Corp.*, 171 N.Y. 538, 64 N.E. 442 (1902); 1903 N.Y. Laws ch. 132, § 1-2.

42. Cf. U.S. CONST. amend. V ("private property"). Marital privacy, as a fundamental right, was first discussed by the United States Supreme Court in the dissenting opinions of Justices Douglas and Harlan in *Poe v. Ullman*, 367 U.S. 497 (1961). Justice Harlan's dissent in *Poe* only recognized marital sexual intimacies as worthy of a right to privacy. He specifically excluded all extramarital sexual conduct, including homosexuality. *Id.* at 553. Sexual privacy was mentioned as early as *Skinner v. Oklahoma*, 316 U.S. 535 (1942), an equal protection case, but one emphasizing marriage and procreation as "basic civil rights" and requiring "strict scrutiny." *Id.*

wold v. Connecticut⁴³ the Supreme Court invalidated a statute forbidding the use of contraceptives as it applied to a married couple on the grounds that it violated a constitutional right to privacy implicit in the marital relationship.⁴⁴

Justice Douglas, writing for the Court, found that an independent right to privacy could be inferred from a number of constitutional provisions:

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁴⁵

Justice Goldberg, concurring and joined by Chief Justice Warren and Justice Brennan, believed the right to privacy was included in the "liberty" interest protected by the fourteenth amendment; he pointed to the ninth amendment as evidence that such liberty was not restricted to specific provisions of the Bill of Rights.⁴⁶ Justice Harlan, also concurring, declared that the right to privacy was part of the due process clause of the fourteenth amendment, and that it was "implicit in the concept of ordered liberty."⁴⁷

Four years later, the constitutional right of privacy was extended to include circumstances involving neither marital intimacy nor procreative choice. In *Stanley v. Georgia*,⁴⁸ the Court held unconstitutional a state law prohibiting the private possession of obscene materials.

at 541. For a discussion of the strict scrutiny standard of review, see *infra* notes 86-22 and accompanying text.

43. 381 U.S. 479 (1965).

44. The privacy right created in *Griswold* may have little to do with privacy as that term is commonly understood and more to do with autonomy in making certain decisions. See Katz, *Sexual Morality and the Constitution*: People v. Onofre, 46 ALB. L. REV. 311, 316 (1982); see also *infra* note 57 and accompanying text.

45. *Griswold*, 381 U.S. at 484.

46. *Id.* at 486-87.

47. *Id.* at 500. Due process was likewise the basis for Justices Goldberg, Warren, and Brennan's concurrence. *Id.* at 486. Justice Douglas also mentioned the due process clause of the 14th amendment, but it is not clear whether he is referring to incorporation or to an independent source of rights. *Id.* at 481-82.

48. 394 U.S. 557 (1969).

"[A]lso fundamental," said the Court, "is the right to be free . . . from unwarranted governmental intrusions into one's privacy."⁴⁹ Three years later, in *Eisenstadt v. Baird*,⁵⁰ the Supreme Court struck down a Massachusetts statute, which forbade the distribution of contraceptives to single individuals, on the grounds that it violated the equal protection clause of the fourteenth amendment.⁵¹ The *Eisenstadt* majority held that *Griswold's* doctrine of marital privacy was actually an individual right—that indeed if the right of privacy has any meaning at all, it is the right of the individual, whether married or single, to be free from unwarranted governmental meddling into matters so personal as the decision whether to bear a child.⁵² A year later, in *Roe v. Wade*,⁵³ the right of privacy was found to protect an unmarried woman's choice to terminate her pregnancy. In 1976, the Court extended the right of privacy to minors in *Planned Parenthood v. Danforth*,⁵⁴ where it held unconstitutional a state statute requiring parental consent to an abortion by an unmarried minor. In so doing, the Supreme Court again extended the right of privacy beyond the traditional marital relationship to the individual.⁵⁵ Finally, in *Whalen v. Roe*,⁵⁶ the concept of privacy was said to include the notion of autonomy.⁵⁷

B. Homosexuality and Privacy

The various facets of the right of privacy as enunciated by the Court could provide a logical constitutional framework for challenging the validity of the sodomy laws. First, the Court indicated in *Griswold*⁵⁸ and *Eisenstadt*⁵⁹ that the right of privacy protects certain "inti-

49. *Id.* at 564.

50. 405 U.S. 438 (1972).

51. *Id.* at 446-55.

52. *Id.* at 453.

53. 410 U.S. 113 (1973).

54. 428 U.S. 52 (1976).

55. *Id.* See also *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983) (state statute requiring parental consent to abortion of a minor violated woman's rights of privacy).

56. 429 U.S. 589 (1977).

57. In *Whalen*, Justice Stevens noted that "[t]he cases sometimes characterized as protecting privacy have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 598-600 (footnote omitted). He cited Professor Kurland in noting three facets of the largely undefined right of privacy:

The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience and belief from governmental compulsion.

Id. at 599 n.24. See Katz, *supra* note 44, at 316.

58. 381 U.S. 479. See *supra* notes 43-47 and accompanying text.

59. 405 U.S. 438. See *supra* notes 50-51 and accompanying text.

mate relationships," whether in marriage or not. Plainly, personal sexual conduct, whether heterosexual or homosexual, involves intimate relationships. Second, *Stanley*⁶⁰ clearly held that certain activities, even if at odds with traditional mores, will be constitutionally protected when they take place within the confines of the home. But many of the sodomy statutes criminalize sodomy no matter where it occurs. Third, *Roe*⁶¹ and *Whalen*⁶² recognize that the right of privacy is linked to the concept of autonomy in private, intimate, human relationships.⁶³

The Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*,⁶⁴ however, appears to support a contrary conclusion. The plaintiffs in *Doe* sought a declaratory judgment that Virginia law was unconstitutional insofar as it affected private homosexual activities between consenting adults. Among other arguments, they claimed the statute violated their constitutional right of privacy.⁶⁵ The United States District Court for the Eastern District of Virginia upheld the Virginia statute by narrowly construing *Griswold* as limiting the right of privacy to the marital relationship.⁶⁶ "Homosexual intimacy" was not protected because it is "obviously no portion of marriage, home, or family life."⁶⁷ The court cited both Justice Goldberg's concurring opinion in *Griswold*⁶⁸ and Justice Harlan's dissenting opinion in *Poe v. Ullman*⁶⁹ for the proposition that homosexual activity is still "denunciable by the State."⁷⁰ Additionally, valid concerns of "morality and decency"⁷¹ were found to be served by the statute in question, because these interests formed a "rational basis of State interest demonstrably legitimate and mirrored in the cited decisional law of the Supreme Court."⁷²

Only the dissenting opinion of Justice Merhige in *Doe* sought to

60. 394 U.S. 557. See *supra* notes 48-49 and accompanying text.

61. 410 U.S. 113. See *supra* note 53 and accompanying text.

62. 429 U.S. 589, See *supra* notes 56-57 and accompanying text.

63. See *supra* note 57.

64. 425 U.S. 901 (1976).

65. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1200 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). The text of VA. CODE § 18.2-361 (Supp. 1979) reads:

If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a Class 6 felony.

If any person shall by force carnally know any male or female person by the anus or by or with the mouth he or she shall be guilty of a Class 3 felony.

66. *Doe*, 403 F. Supp. at 1201-02.

67. *Id.* at 1202.

68. *Id.* at 1201 (quoting *Griswold*, 381 U.S. at 498-99).

69. *Id.* at 1201-02 (quoting *Poe v. Ullman*, 367 U.S. 497, 546 (1961)).

70. *Id.* at 1201.

71. *Id.* at 1202. See *infra* notes 293-95 and accompanying text.

72. *Doe*, 403 F. Supp. at 1203.

bring homosexuality under the umbrella of the right to privacy. Applying both *Eisenstadt* and *Roe*, he argued that:

the right to privacy in sexual relationships is not limited to the marital relationship. . . . [I]ntimate personal decisions or private matters of substantial importance to the well-being of the individuals involved are protected by the Due Process Clause. The right to select consenting adult sexual partners must be considered within this category. The exercise of that right, whether heterosexual or homosexual, should not be proscribed by state regulation absent compelling justification.⁷³

While it is clear that the *Doe* decision was a setback for the rights of homosexuals,⁷⁴ its full effect is far from clear. Indeed, the Supreme Court itself appears to be in disagreement concerning the precedential value of the *Doe* affirmance.⁷⁵ In *Carey v. Population Services International*,⁷⁶ Justice Brennan noted that the Court "has not definitively answered" the question of the state's power to regulate consensual behavior.⁷⁷ Justice Rehnquist, on the other hand, thought that the matter had been settled by the affirmance of *Doe* in favor of the state's right of regulation.⁷⁸

Several lower courts have, subsequent to the *Doe* decision, ruled that the right of privacy does extend to homosexual conduct. In *People v. Onofre*,⁷⁹ the New York Court of Appeals struck down a New York penal law criminalizing sodomy on the grounds that it violated the constitutional right of privacy.⁸⁰ The court characterized the right of privacy as involving "a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint."⁸¹ In so doing it ruled that *Stanley* and *Eisenstadt* had extended the right

73. *Id.* at 1204 (Mehrig, J., dissenting).

74. This was immediately recognized. *See* TIME, Apr. 12, 1976, at 50; Comment, *supra* note 8, at 840.

75. It is well established that a summary affirmance does not necessarily represent adoption of the opinion below, and may only be the most effective way for the Court to avoid a decision in order to gain time for a more thorough consideration of the issue in question. *See* *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring).

76. 431 U.S. 678 (1977).

77. *Id.* at 694 n.17.

78. *Id.* at 718 n.2 (Rehnquist, J., dissenting). The Fourth Circuit has already held that the Supreme Court's decision in *Griswold* "necessarily confined the constitutionally protected right of privacy to heterosexual conduct, probably even that only within the marital relationship." *Lovisi v. Slayton*, 539 F.2d 349, 352 (4th Cir. 1976).

79. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

80. *Id.* at 488-89, 415 N.E.2d at 940-41, 434 N.Y.S.2d at 951. For a full discussion of the case, see Katz, *supra* note 44.

81. *Onofre*, 51 N.Y.2d at 485, 415 N.E.2d at 939, 434 N.Y.S.2d at 949.

of privacy to include individual choices by unmarried persons to engage in sexually intimate acts.⁸² It concluded that, absent a showing of harm, the statutory prohibition of consensual sodomy was violative of the right of privacy.⁸³ Similarly, in *Baker v. Wade*,⁸⁴ the Federal District Court for the Northern District of Texas held that the right of privacy extends to sexual conduct between homosexual adults, finding that the right was not limited to two aspects of sexual behavior—marital intimacy and procreative choice.⁸⁵

IV. EQUAL PROTECTION: EISENSTADT, FRONTIERO, AND DOE

In addition to what it had to say about the right of privacy, the decision in *Doe v. Commonwealth's Attorney*⁸⁶ served to articulate another facet of homosexual-rights litigation: homosexuals are not viewed as a "suspect class," against whom any discrimination must be subjected to the "strict scrutiny" test, but instead are treated as a group to which the less severe "rational basis" standard is applied.⁸⁷

The fourteenth amendment provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the law."⁸⁸ In its protection of individual rights, this clause has been interpreted to preclude "the enforcement of exclusionary classifications based upon deeply felt beliefs which are not grounded on objective, rational distinctions."⁸⁹ In many situations, the government need only establish some rational basis for its discriminatory behavior in order to justify regulatory prohibitions.⁹⁰ But where a discriminatory law touches upon a "fundamental interest,"⁹¹ or creates a "suspect classification,"⁹² strict judicial scrutiny is required and the government must establish that the

82. *Id.* at 486–87, 415 N.E.2d at 939–40, 434 N.Y.S.2d at 950.

83. *Id.* at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 952–53.

84. 553 F. Supp. 1121 (N.D. Tex. 1982), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984), *reh'g en banc granted*, 743 F.2d 236 (Jan. 25, 1985).

85. *Id.* at 1140. Subsequent to *Baker*, the United States Court of Appeals for the Eighth Circuit ruled that, since the defendants were accused of *public* acts of sodomy, no right of privacy was implicated and held that the Arkansas sodomy statute was not unconstitutional as applied to the defendants since the conduct occurred in a public restroom. *United States v. Lemons*, 697 F.2d 832 (8th Cir. 1983).

86. 403 F. Supp. 1199 (E.D. Va. 1974), *aff'd mem.*, 425 U.S. 901 (1976).

87. *Id.* at 1202.

88. U.S. CONST. amend. XIV, § 1. The fifth amendment by implication prohibits similar actions by the federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

89. Comment, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 582 (1973).

90. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

91. See *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626–30 (1969).

92. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (voiding a Virginia antimiscegenation statute).

legislation is necessary to promote a compelling state interest.⁹³

Suspect classes are composed of "discrete and insular minorities," groups incapable of looking after their own interests through normal political means.⁹⁴ To date, only classifications by race, alienage, and national origin have been held suspect.⁹⁵ The category of "poor people," for example, has been rejected as a suspect classification because it is too "large, diverse and amorphous."⁹⁶ The criteria that the Court has developed to determine the existence of a suspect classification include whether the classification is based upon traits over which the individual has no control;⁹⁷ whether it is more the reflection of historic prejudices than legislative rationality;⁹⁸ whether the group discriminated against is relatively powerless to protect its interest in the political arena;⁹⁹ and, finally, whether the classified group has a history of having been purposefully subjected to unequal treatment.¹⁰⁰

Although it is unclear how many criteria there are to determine a suspect class, or how many need be satisfied, homosexuals do appear to meet at least several of the enunciated tests. They have no control over their sexual proclivities;¹⁰¹ laws punishing their condition may arguably derive more from historical prejudice than reason;¹⁰² and, though increasingly vocal and politically active, they have a long history as being the object of discrimination. Although homosexuals appear to meet each of these measures for a suspect class, the courts thus far have refused to apply a stricter standard of review in cases regarding discrimination against them,¹⁰³ applying instead something less than the strict scrutiny test.¹⁰⁴

It is difficult to avoid the conclusion, however, that classifications based upon sexual preference should be entitled to at least the same

93. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

94. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4. (1938). See generally Comment, *The Constitutionality of Sodomy Statutes*, 45 *FORDHAM L. REV.* 553, 587 (1976).

95. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race).

96. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

97. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

98. *Id.* at 684-86.

99. *Rodriguez*, 411 U.S. at 28.

100. *Id.* See *Hughes v. State*, 14 Md. App. 497, 503, 287 A.2d 299, 305 (1972) (although enforcement of sodomy statutes against married couples may be prohibited under *Griswold*, enforcement against unmarried persons held not to deny any equal protection law), *cert. denied*, 409 U.S. 1025 (1972).

101. See J. BAER, *EQUALITY UNDER THE CONSTITUTION* 232 (1983); Cooper, *The Aetiology of Homosexuality*, in *UNDERSTANDING HOMOSEXUALITY: ITS BIOLOGICAL AND PSYCHOLOGICAL BASES* 4-10 (J. Lorraine ed. 1974).

102. See Comment, *supra* note 8, at 849; see also O.W. HOLMES, *supra* note 26.

103. See Comment, *supra* note 94, at 588 n.185.

104. See *infra* notes 116-18 and accompanying text.

degree of scrutiny afforded those based on sex. In *Frontiero v. Richardson*,¹⁰⁵ four justices declared in a plurality opinion that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to close judicial scrutiny."¹⁰⁶ The rationale was that sex, like race or national origin, is an immutable characteristic determined at birth, and that our nation has engaged in sex discrimination for a long time.¹⁰⁷ Similarly, although there is a difference of opinion as to whether sexual preference is congenital, few dispute the facts that from a very early age it is apparently beyond the individual's control and that homosexuals have been social outcasts of long standing.¹⁰⁸ While the *Frontiero* rationale has never been voiced by a majority of the Court,¹⁰⁹ it could provide a persuasive analogy for the argument that sexual preference deserves as much protection against discrimination as that based on gender.¹¹⁰

The other way by which classifications based upon homosexual orientation could receive strict judicial scrutiny is to demonstrate that the unequal treatment directly affects a fundamental interest¹¹¹—a right which is explicitly or implicitly guaranteed by the Constitution.¹¹² The right to privacy, for example, has been held to be a fundamental interest for the purpose of equal protection analysis.¹¹³ Thus, discriminatory schemes based on homosexual preference may require strict scrutiny because the unequal treatment affects the individual's right to

105. 411 U.S. 677.

106. *Id.* at 682.

107. *Id.* at 684.

108. See *supra* notes 6 & 16 and *infra* note 133.

109. In fact, the Supreme Court recently has all but sounded the death knell for sex as a suspect classification. In *Stanton v. Stanton*, 421 U.S. 7 (1975), *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Scheslinger v. Ballard*, 419 U.S. 498 (1975), the Court employed a vigorous version of the rational basis test rather than relying upon sex as a suspect classification. Even Justice Brennan, who had taken such a strong stance in favor of sex as a suspect classification in *Frontiero*, elected to apply the rational basis test in *Wiesenfeld*. More recently, however, the Court has developed and clarified the standard of review to be applied to gender-based classifications. Legislation establishing such classifications must substantially relate to the achievement of an important governmental objective. *Orr v. Orr*, 440 U.S. 268 (1979); *Craig v. Boren*, 429 U.S. 190 (1976). Discrimination against homosexuals is arguably sex discrimination in that both heterosexuals and lesbians are protected. See *supra* note 25.

110. See Comment, *supra* note 94, at 588 n.185.

111. See *Kramer*, 395 U.S. at 626–30.

112. See *Shapiro*, 394 U.S. at 630–31. Interests that have been declared to be fundamental for purposes of equal protection include: the freedom of speech (*Police Dept. v. Mosley*, 408 U.S. 92 (1972)); the right to interstate travel (*United States v. Guest*, 383 U.S. 745 (1966)); the right to procreate (*Skinner v. Oklahoma*, 316 U.S. 535 (1942)); the right to vote in state elections (*Reynolds v. Sims*, 377 U.S. 533 (1964)); and the right to an appeal from a criminal conviction (*Griffin v. Illinois*, 351 U.S. 12 (1956)).

113. E.g., *Skinner*, 316 U.S. 535. See also *supra* notes 39–88 and accompanying text.

privacy.¹¹⁴

Since Warren Burger has been chief justice, the Supreme Court has expressed mounting discontent with strict scrutiny and rational basis as the only available standards for evaluating the application of the equal protection doctrine.¹¹⁵ In 1982, two Supreme Court cases¹¹⁶ lent support to the establishment of a "middle tier" which had been given earlier credence in the lower federal courts in regard to the treatment of homosexuals.¹¹⁷

In practice, both the rational basis and middle tier standards have usually resulted in approval of the legislation in question, with the Court often placing the burden of proving unconstitutionality upon the party attacking the statute.¹¹⁸ A number of lower courts have cited *Eisenstadt v. Baird*¹¹⁹ in overturning antisodomy statutes that applied exclusively to unmarried persons, finding such laws violative of the equal protection clause.¹²⁰ Substantial doubt remains, however, on the issue of whether the Supreme Court will follow suit.¹²¹ The Court's apparent reluctance to apply the strict scrutiny standard to homosexual discrimination has made it more difficult for a homosexual to allege successfully that a fifth or fourteenth amendment right to equal protection has been denied.

V. FIRST AND EIGHTH AMENDMENT PROTECTIONS

There are two remaining methods by which discrimination against

114. See *supra* text accompanying notes 39-88.

115. See Justice Marshall's dissent in *Rodriguez*, 411 U.S. 1, 88-89, 98-100; Justice Powell's opinion for the Court in *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 169, 172 (1972); and Chief Justice Burger's opinion in *Jimenez v. Weinberger*, 417 U.S. 628, 631-38 (1974). See also *Craig*, 429 U.S. at 211 (Stevens, J., concurring).

116. *Mills v. Habluckzel*, 456 U.S. 91 (1982); *Plyler v. Doe*, 456 U.S. 202 (1982).

117. See, e.g., *Hatheway v. Secretary of Army*, 641 F.2d 1376, 1382 (9th Cir. 1981); *Beller v. Middendorf*, 632 F.2d 788, 807 (9th Cir. 1980); *Commonwealth v. Bonadio*, 490 Pa. 91, 99, 415 A.2d 47, 51 (1980). Generally, the middle tier approach is more stringent than that requiring a rational basis, but somewhat less rigid than the strict scrutiny test. See Chief Justice Burger's statement in invalidating a challenged statute that was sexually discriminatory by insisting that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). See also *supra* notes 110-11.

118. See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961), which held that the rational basis test would be satisfied if "any state of facts reasonably may be conceived to justify" the legislation. *Id.* at 426 (emphasis added). Cf. *Taylor v. State*, 214 Md. 156, 133 A.2d 414 (1957) (assault with intent to commit sodomy is a crime against the public generally). See generally *Preston & Mehlman, The Due Process Clause as a Limitation on the Reach of State Legislation: An Historical and Analytical Examination of Substantive Due Process*, 8 U. BALT. L. REV. 1 (1978).

119. 405 U.S. 438 (1972). See *supra* notes 50-51 and accompanying text.

120. See, e.g., *People v. Rice*, 80 Misc. 2d 511, 363 N.Y.S.2d 484 (Dist. Ct. 1975).

121. See generally *Comment, supra* note 94, at 489-92.

homosexuals may conceivably be challenged. The first is by way of the eighth amendment's prohibition against cruel and unusual punishment. The second utilizes as its basis the first amendment's safeguard of free speech and free association.

The eighth amendment has traditionally been used to protect persons facing criminal punishment, but the argument that it can apply by analogy to civil punishments¹²² has been rejected.¹²³ In *Robinson v. California*,¹²⁴ the Supreme Court held that a statute which makes it a misdemeanor to be addicted to the use of narcotics violates the cruel and unusual punishment clause.¹²⁵ The Court distinguished between punishment for a status and punishment for an overt act necessarily related to that status, and concluded that the former was impermissible.¹²⁶ Subsequently, however, in *Powell v. Texas*,¹²⁷ the conviction of an alcoholic for public drunkenness was upheld by the Court despite evidence that alcoholism constituted a disease.¹²⁸ The Court supported its conclusions by maintaining that the alcoholic was not being punished for his condition, but rather for being in public while drunk.¹²⁹ In his dissenting opinion, Justice Fortas interpreted *Robinson* to mean that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."¹³⁰ Since it is generally agreed that adult homosexuals cannot change their sexual preference,¹³¹ it may be argued that civil discrimination and penal legislation against homosexuals is unconstitutional punishment.¹³²

Alternatively, sodomy statutes could be challenged on eighth amendment grounds as cruel and unusual punishment.¹³³ In *Gregg v.*

122. See, e.g., *Baker v. Nelson*, 291 Minn. 310, 312, 191 N.W.2d 185, 187 (1971), *appeal dismissed*, 409 U.S. 810 (1972) (court rejected without discussion petitioner's contention that marriage statute which prohibited marriage between people of the same sex violated the eighth amendment).

123. *Ingraham v. Wright*, 430 U.S. 651 (1977).

124. 370 U.S. 660 (1962).

125. *Id.* at 667.

126. *Id.* at 665-67. See also *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1330 (5th Cir. 1984), *appealed dismissed*, 105 S. Ct. 1860 (1985); *Gay Lib v. University of Mo.*, 558 F.2d 848, 856 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978) (denying recognition to a gay group smacks of penalizing persons for their status rather than their conduct which is constitutionally impermissible).

127. 392 U.S. 514 (1968).

128. *Id.* at 536-37.

129. *Id.* at 532.

130. *Id.* at 567 (Fortas, J., dissenting).

131. See Cooper, *supra* note 101, at 4-10.

132. NATIONAL INSTITUTE OF MENTAL HEALTH, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY 15 (1969); cf. W. MASTERS & V. JOHNSON, *supra* note 21 (suggesting that certain homosexuals may be able to alter their sexual preference).

133. At common law, sodomy was punishable by death. See *supra* note 33. No state today imposes capital punishment for this offense, although very heavy sentences have been sustained.

Georgia,¹³⁴ the Supreme Court recognized that cruel and unusual punishment can mean sentences disproportionate to the offense charged.¹³⁵ A possible ten-to-twenty-year prison sentence certainly seems disproportionate to an offense involving sexual behavior between consenting adults.

In this area, litigation under the eighth amendment is even more difficult than under the other amendments. This, coupled with the historic limitation of the eighth amendment to criminal matters, renders it highly unlikely that the courts would consider penalties for homosexuality to be cruel and unusual.

On the other hand, arguments based on the first amendment's guarantees of free speech and free assembly have been considerably more fruitful. Over the years, the Supreme Court has developed a "constellation" of personal rights which emanates from those explicitly protected by the Constitution.¹³⁶ Among the implicit freedoms is the right of an individual to associate with others in order to further his or her personal beliefs.¹³⁷

An independent right of association was first recognized in *NAACP v. Alabama ex rel. Patterson*.¹³⁸ The right was said to derive from the first amendment and to be incorporated by the fourteenth.¹³⁹ In analyzing possible infringements of the right to associate, subsequent courts have consistently declared that any denial of benefits which diminishes a group's ability to engage in legal endeavors, however indirect or insignificant, would amount to a violation of the constitutional guarantee.¹⁴⁰ Whether homosexuality should be "legal," of course, goes to the heart of the question of civil liberties.¹⁴¹

The issue of first amendment protections for homosexuals has been fueled by numerous confrontations between student homophile organizations and educational institutions. There is little doubt today that

E.g., Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964) (20 to 30-year sentence struck down on other grounds); Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973), cert. denied, 416 U.S. 905 (1974) (eight-year sentence); Sinclair v. State, 166 Tex. Crim. 167, 311 S.W.2d 824 (1958) (10-year sentence). See generally Comment, *supra* note 8, at 864-65.

134. 428 U.S. 153, vacated, 429 U.S. 875 (1976).

135. *Id.* at 173.

136. See Gay Students Org. v. Bonner, 367 F. Supp. 1088, 1094 (D.N.H.), modified, 509 F.2d 652 (1st Cir. 1974); Note, *Freedom of Political Association on the Campus: The Right of Official Recognition*, 46 N.Y.U. L. Rev. 1149, 1152-58 (1971).

137. See, e.g., Healy v. James, 408 U.S. 169, 181 (1972). See generally Wilson & Shannon, *Homosexual Organizations and the Right of Association*, 30 HASTINGS L.J. 1029 (1979).

138. 357 U.S. 449 (1958).

139. *Id.* at 460.

140. See, e.g., Bates v. City of Little Rock, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

141. See *infra* text accompanying notes 265-74.

students are entitled to such protections. In *Tinker v. Des Moines Independent Community School District*,¹⁴² the Supreme Court asserted that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁴³ More recently, in *Healy v. James*,¹⁴⁴ the Court articulated the right further, holding that a state university's denial of permission to use campus facilities for meetings by its chapter of Students for a Democratic Society, unconstitutionally impeded that group's freedom of association.¹⁴⁵

Subsequent to the 1972 *Healy* decision, three federal circuits sustained the right of a student homophile organization to sponsor campus social functions.¹⁴⁶ These decisions were based, at least in part, on the first amendment. In *Gay Students Organization v. Bonner*,¹⁴⁷ the federal district court held that although the university had not violated the students' more traditional first amendment rights, it could nonetheless be enjoined on the basis of a violation of the right of association.¹⁴⁸ The First Circuit affirmed, noting that although the prohibited social functions did not constitute "pure speech," there was sufficient "communicative conduct" to bring the organization within the ambit of traditional first amendment rights.¹⁴⁹ Communicative conduct, the Supreme Court has held, may be regulated in "time, place and manner" to further a substantial governmental interest—but only if the limitations imposed are not designed strictly to suppress the subject matter of the communication.¹⁵⁰

Similarly, in *Gay Alliance of Students v. Matthews*,¹⁵¹ the Fourth Circuit found a clear violation of first amendment rights when Virginia Commonwealth University refused to recognize a homophile group as a registered student organization. In so holding, the court made it clear that the group in question was not devoted to illegal sexual conduct,¹⁵² but noted that individuals of every sexual persuasion have a fundamental right to meet, discuss current problems, and advocate changes in the

142. 393 U.S. 503 (1969).

143. *Id.* at 506.

144. 408 U.S. 169 (1972).

145. *Id.* at 181.

146. *Gay Lib*, 558 F.2d 848; *Gay Alliance v. Matthews*, 544 F.2d 162 (4th Cir. 1976); *Bonner*, 509 F.2d 652. *But see* *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977) (student newspaper refused to accept a paid advertisement tendered by an off-campus gay organization).

147. 367 F. Supp. 1088 (D.N.H.), *modified*, 509 F.2d 652 (1st Cir. 1974).

148. *Id.* at 1094.

149. *Bonner*, 509 F.2d at 660.

150. *See, e.g.*, *Police Dep't v. Mosley*, 408 U.S. 92, 98 (1972); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

151. 544 F.2d 162 (4th Cir. 1976).

152. *Id.* at 166.

status quo—so long as there is no “incitement to imminent lawless action.”¹⁵³

Gay Lib v. University of Missouri,¹⁵⁴ an Eighth Circuit case, is particularly interesting in light of the Supreme Court’s subsequent involvement. Relying on *Healy*, *Bonner*, and *Matthews*, the court of appeals reversed the district court’s¹⁵⁵ support of the university’s refusal to recognize *Gay Lib*.¹⁵⁶ The university appealed. Although the Supreme Court denied certiorari,¹⁵⁷ Justice Rehnquist, joined by Justice Blackmun, said that he would have heard the case and, further, that he was inclined to reverse the Eighth Circuit.¹⁵⁸

From the point of view of the University . . . the question is . . . akin to whether those suffering from measles have a constitutional right, *in violation of quarantine regulations, to associate together and with others who do not presently have measles*, in order to urge repeal of a state law providing that measles sufferers be quarantined. The very act of assemblage under these circumstances undercuts a significant interest of the State which a plea for the repeal of law would nowise do.¹⁵⁹

Such casual equation of measles with homosexuality, coming as it does with the delicate balancing of individual liberty and governmental restraint, reflects little more than unbecoming sophistry.¹⁶⁰ The university sought a rehearing, which the Court likewise denied.¹⁶¹

Recently, in *Gay Student Services v. Texas A & M University*,¹⁶² the Fifth Circuit, relying on *NAACP v. Alabama ex rel. Patterson* and *Healy*, found that a university’s refusal to recognize a homosexual student group violated the group members’ first amendment right of association.¹⁶³ The court found that the university’s claims that recognition of the group would jeopardize public health, and that the group mem-

153. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

154. 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).

155. 416 F. Supp. 1350 (W.D. Mo. 1976), *rev’d*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).

156. 558 F.2d at 857.

157. *Ratchford v. Gay Lib*, 434 U.S. 1080 (1978) (Chief Justice Burger would have granted certiorari and given plenary consideration).

158. *See id.* at 1082.

159. *Id.* at 1084 (emphasis added).

160. Judges frequently express revulsion for homosexuality from the bench. *See, e.g.*, *Schlegel v. United States*, 416 F.2d 1372, 1378 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970); *In re Schmidt*, 56 Misc. 2d 456, 460, 289 N.Y.S.2d 89, 92 (Sup. Ct. 1968); *H. v. H.*, 59 N.J. Super. 227, 237, 157 A.2d 721, 727 (1959). Dissenting in *National Gay Task Force*, Judge Barrett stated that sodomy was “*malum in se*, immoral and corruptible in its nature without regard to the fact of its being noticed or punished by the law of the state.” 729 F.2d at 1276.

161. 435 U.S. 981 (1978).

162. 737 F.2d 1317 (5th Cir. 1984), *appealed dismissed*, 105 S. Ct. 1860 (1985).

163. *Id.* at 1334.

bers' goals were inconsistent with the goals of the university, were insufficiently compelling to justify infringement of the group members' first amendment rights.¹⁶⁴

More significantly, in *National Gay Task Force v. Board of Education*,¹⁶⁵ the Tenth Circuit examined an Oklahoma statute which not only permitted a teacher to be fired for engaging in "public homosexual activity," but also for publicly advocating homosexual conduct.¹⁶⁶ The National Gay Task Force (NGTF) filed a class action on behalf of Oklahoma public school teachers, asserting that the statute was unconstitutional on its face. The district court held that the statute was valid.¹⁶⁷ NGTF appealed, contending that the statute violated the right of privacy, as well as both the equal protection and establishment clauses, that it was void for vagueness, and that it was overly broad. The Tenth Circuit reversed.¹⁶⁸

The court circumvented the privacy argument by noting that the right of privacy established in *Onofre* and *Baker*, which protects private, consensual, homosexual acts, was not applicable because the statute specifically punished only public homosexual conduct.¹⁶⁹ The court similarly rejected NGTF's contention that the statute was unconstitutionally vague in regard to "public homosexual activity," finding that Oklahoma cases construing the "crime against nature" statute had clearly defined the acts that the statute proscribed.¹⁷⁰ Also dismissed was NGTF's equal protection argument: the court held that because a classification based on the choice of sexual partners was not suspect, "something less than a strict scrutiny test" should be applied.¹⁷¹

164. *Id.* at 1333. The court noted that "undifferentiated fear of apprehension" is not enough to overcome the right to freedom of expression. *Id.* at 1330 (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. at 508 and *Healy v. James*, 408 U.S. at 191).

165. 729 F.2d 1270 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 105 S. Ct. 1858 (1985).

166. *Id.* at 1272-74. The Oklahoma statute reads in pertinent part:

A. As used in this section:

1. "public homosexual activity" means the commission of an act [oral or anal sodomy] . . . if such act is: a. committed with a person of the same sex, and b. indiscreet and not practiced in private;

2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees

OKLA. STAT. tit. 70, § 6-103.15 (West Supp. 1984).

167. *National Gay Task Force*, 729 F.2d at 1272.

168. *Id.* at 1273-75.

169. *Id.* at 1273.

170. *Id.*

171. *Id.* In refusing to declare homosexuals a "suspect class," the court relied on the fact that only a plurality of the Supreme Court has declared gender a suspect classification. *See Frontiero*, 411 U.S. 677.

The Tenth Circuit, however, sustained NGTF's challenge on the basis of facial overbreadth.¹⁷² Although it said that such arguments were "strong medicine" and should be used sparingly, the court was, nevertheless, willing to invalidate the statute because it regulated pure speech.¹⁷³ The first amendment protects advocacy, even of illegal conduct, unless the advocacy is likely to produce imminent lawless action.¹⁷⁴ Advocating social change, the court insisted, was at the core of first amendment protection.¹⁷⁵ The state's legitimate interest in regulating the speech of its teachers can outweigh the teacher's interest only when the expression results in a material or substantial interference in the normal activities of the school.¹⁷⁶ This burden, the court concluded, had not been met by the state.¹⁷⁷ The court held that the unconstitutional portion of the statute was severable from the rest of it; again, the part which proscribes "homosexual activity," was found to be constitutional.¹⁷⁸ The case was appealed to the Supreme Court, which by virtue of a four-to-four deadlock upheld the Tenth Circuit opinion.¹⁷⁹

VI. EMPLOYMENT DISCRIMINATION: ANALYSIS BY EXAMPLE

Ironically, while homosexuals have been relatively successful in arguing their rights to free speech and assembly, they have found the first amendment virtually useless in preventing employment discrimination.¹⁸⁰ Under the constitutional guarantees of free speech, due process, and equal protection of the laws, public employers need only a rational basis for refusing to hire or for dismissing an employee.¹⁸¹

As recently as 1969, the United States Civil Service Commission maintained that "persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts . . . are not suitable for federal employment."¹⁸² In *Norton*

172. *Id.* at 1274.

173. *Id.*

174. *Id.* (citing *Brandenburg*, 395 U.S. at 447).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1275. See *infra* notes 206-15 and accompanying text.

179. 105 S. Ct. 1858 (1985) (mem.) See *supra* note 3 and accompanying text..

180. See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 934 (1979).

181. See *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969). See generally 42 U.S.C. §§ 2000e-2-2000e-3 (1982).

182. U.S. CIVIL SERV. COMM'N, FEDERAL PERSONNEL SUPPLEMENT 721-71 (1984). See generally Levine, *Legal Rights of Homosexuals in Public Employment*, 1978 ANN. SURV. AM. L. 455; Note, *Government-Created Employment Disability of the Homosexual*, 82 HARV. L. REV. 1738 (1969); Sinscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495 (1976). "One homosexual can pollute a Government office." SENATE COMMITTEE ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PER-

v. Macy,¹⁸³ however, the Court of Appeals for the District of Columbia held that a competent civil servant could not be dismissed solely on the basis of private homosexual conduct.¹⁸⁴ The civil service regulation was found to be overly broad and a denial of due process.¹⁸⁵ Dismissal may be justified, though, where there is a rational connection between deliberate public homosexual involvement and diminished efficiency on the job.¹⁸⁶ The same distinction appears to be made at state and local levels, where homosexuals have been protected against discriminatory regulations under the first amendment,¹⁸⁷ but not where their job performance was deleteriously affected,¹⁸⁸ or where they had engaged in overt, public homosexual behavior.¹⁸⁹

There has been relatively little litigation by homosexuals in the private sector except to challenge discriminatory hiring or firing as violative of Title VII of the Civil Rights Act of 1964,¹⁹⁰ which prohibits discrimination on the basis of sex. The courts, as well as the Equal Employment Opportunity Commission, generally have held that Title VII refers to discrimination because of *gender*, not sexual proclivity.¹⁹¹

VERTS IN GOVERNMENT, S. DOC. NO. 241, 81st Cong., 2d Sess. 4 (1950).

183. 417 F.2d 1161 (D.C. Cir. 1969). *See also* Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973), *aff'd*, 528 F.2d 905 (9th Cir. 1975) (finding of immoral or indecent conduct would support dismissal without further inquiry if conduct has ascertainable and deleterious effect on efficiency of the service).

184. *See infra* note 191 and accompanying text.

185. For arguments against sodomy statutes as vague and overly broad, see Comment, *supra* note 94, at 556-67.

186. *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977). *See Norton*, 417 F.2d at 1165. *But see Aumiller v. University of Del.*, 434 F. Supp. 1273 (D. Del. 1977).

187. *Burton v. Cascade School Dist. Union High School No. 5*, 512 F.2d 850 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 839 (1975); *Acanfora v. Board of Educ.*, 491 F.2d 498, 501 (4th Cir. 1973) *cert. denied*, 419 U.S. 836 (1974).

188. *See Safransky v. State Personnel Bd.*, 62 Wis. 2d 464, 215 N.W.2d 379 (1974) (dismissal of plaintiff who was a homosexual house-parent for retarded minor children at a state institution).

189. *See McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1976), in which the homosexual plaintiff was refused a job after having attracted public attention by attempting to marry a fellow homosexual. The court said plaintiff had tried "to foist tacit approval of this socially repugnant concept upon his employer," and was therefore not subject to protection by the law. *Id.* at 196. The court implies, however, that cases involving only private homosexual conduct may merit protection. *Id.*

190. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982), *as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

191. *See, e.g., Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984). *See generally* Siniscalco, *supra* note 182 at 500-06. *But see* Voyler v. Ralph K. Davies Medical Center, 403 F. Supp. 456 (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978); *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975). *See generally* Annot., 42 A.L.R. FED. 189 (1979).

A. Teachers

The problems facing homosexual teachers who commence litigation based on a violation of constitutional rights are especially difficult. This increased difficulty is the result of public sentiment regarding the presence of "impressionable" young people in the classroom and the effect of homosexual teachers on the development of students' attitudes toward sexual preference.¹⁹² If, however, homosexuality is programmed both prenatally and environmentally in the first months of life,¹⁹³ the presence of homosexual teachers in the classroom would have a minimal effect. This rationale, however, is not accepted by the majority of the states; rather, it is either ignored or unknown. Most states have enacted laws which allow the dismissal of a teacher for "immoral behavior."¹⁹⁴ Despite the apparent constitutional difficulties presented by such an inherently vague term, these statutes have generally withstood the scrutiny of federal courts.

The case of *Acanfora v. Board of Education*,¹⁹⁵ provides an interesting study in point; and viewed together with *Gaylord v. Tacoma School District No. 10*,¹⁹⁶ serves to reflect the current confused status of homosexual rights and the law. Acanfora was active in a homophile student organization while an undergraduate at Pennsylvania State University. Upon earning his degree in education he applied for certification as a teacher; a prerequisite to which was a finding of "good moral character." He acknowledged his homosexuality at a hearing before the Pennsylvania State Certification Board. Subsequently, the state authorities announced in a public news conference that Acanfora, although homosexual, had been certified to teach in Pennsylvania. He also was offered a teaching position in Montgomery County, Maryland. But when the Montgomery County Board of Education learned of Acanfora's avowed homosexuality, he was immediately transferred out of the classroom and into a nonteaching position, with no loss of salary, pending further investigation.¹⁹⁷

At trial, in the United States District Court for Maryland, substantial evidence was introduced concerning the effects on students of a

192. According to the results of a Gallup Poll, 56% of the general population supported the principle of equal employment opportunity for homosexuals, but 65% opposed the presence of homosexual teachers in the classroom. N.Y. Times, June 26, 1978, at A12, col. 1.

193. See *supra* notes 22-23 and accompanying text.

194. See, e.g., MD. EDUC. CODE ANN. § 6-202(a) (1978).

195. 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

196. 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977).

197. *Acanfora*, 359 F. Supp. at 845.

teacher's admitted homosexuality.¹⁹⁸ Judge Joseph Young declared that Acanfora's pretrial appearance on several local and national news programs exceeded the discretion which a teacher must exercise concerning his private life, and that such notoriety formed the necessary rational basis to support the Montgomery County School Board's transfer:

Plaintiff's actions were not reasonably necessary for self-defense. Indeed the media appearances were likely to incite or produce imminent effects deleterious to the educational process, and "instead of furnishing a defense, [aggravated] the case."

It is noteworthy that the fault in plaintiff's public appearances does not lie with the possibility of arousing sympathy to the prejudice of a fair trial, but rather with an indifference to the bounds of propriety which of necessity must govern the behavior of any teacher, regardless of sexual tendencies.¹⁹⁹

Although the Fourth Circuit Court of Appeals affirmed Judge Young's decision, it did so based upon Acanfora's willful omission of information regarding his homosexuality, and not upon the teacher's pretrial media appearances.²⁰⁰ Indeed, Acanfora's public statements on homosexuality were held to be constitutionally protected speech: "There is no evidence that the interviews disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results would flow from what he said."²⁰¹

A competing point of view, however, was enunciated in *Gaylord*. The plaintiff was an admittedly competent teacher²⁰² who had kept his homosexual proclivities to himself. But when a suspicious vice-principal questioned him about his sexual preference, Gaylord did not lie. His subsequent dismissal was upheld by Washington's highest state court, which found that public knowledge of Gaylord's homosexuality so im-

198. *Id.* at 847-49.

199. *Id.* at 857.

200. *Acanfora*, 491 F.2d 498, 503-04.

201. *Id.* at 500-01. *See generally* Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977); *Pettit v. State Bd. of Educ.*, 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973) (homosexual may not be excluded from public employment absent specific showing of unfitness to teach). In *Pettit*, the dissenting opinion observed in part:

"[T]he majority opinion is blind to the reality of sexual behavior. Its view that teachers in their private lives should exemplify Victorian principles of sexual morality, and in the classroom should subliminally indoctrinate the pupils in such principles, is hopelessly unrealistic and atavistic." *Pettit*, 10 Cal. 3d at 44, 513 P.2d at 899, 109 Cal. Rptr. at 695 (Tobriner, J., dissenting).

202. His last personal teaching evaluation read in part: "Mr. Gaylord continues his high standards and thorough teaching performance. He is both a teacher and a student in his field." *Gaylord*, 88 Wash. 2d at 300, 559 P.2d at 1347 (Dolliver, J., dissenting).

paired his academic efficiency as to justify his removal.²⁰³ The *Gaylord* decision has been subjected to almost the same quantity and quality of criticism²⁰⁴ as that of *Doe v. Commonwealth's Attorney*.²⁰⁵

In *National Gay Task Force v. Board of Education*,²⁰⁶ the Tenth Circuit Court of Appeals found that a statute providing for dismissal of teachers for "advocating, . . . encouraging or promoting public or private homosexual activity"²⁰⁷ was unconstitutionally overbroad in hindering the first amendment free speech rights of teachers.²⁰⁸ Citing *Brandenburg v. Ohio*,²⁰⁹ the court noted that advocacy, even of illegal conduct, is protected by the first amendment;²¹⁰ certainly public statements advocating a change in the law—such as repeal of antisodomy statutes—would be at the core of first amendment protection.²¹¹ In this case, the court said Oklahoma had not shown that its interests outweighed the free speech rights of teachers.²¹²

The Tenth Circuit, however, upheld that part of the statute which provided for dismissal of teachers who engaged in an indiscreet public act of oral or anal intercourse. The court found the right of privacy was not implicated because the statute punished only public acts. Nor did the statute fail on vagueness or equal protection grounds.²¹³

In an acerbic dissent, Judge Barrett insisted that sodomy is *malum in se*—immoral and corruptible in its nature—and accused teachers who advocate sodomy of "inciting school children to participate in the abominable and detestable crime against nature."²¹⁴ Such a viewpoint runs counter to the medical evidence which suggests that school children cannot be incited to homosexuality, but that by the time they enter school they are already immutably homosexual or heterosexual.²¹⁵

203. *Id.* at 288, 559 P.2d at 1342.

204. See, e.g., Note, *Homosexual Teacher Dismissal: A Deviant Decision*—*Gaylord v. Tacoma School Dist.* No. 10, 53 WASH. L. REV. 499 (1978).

205. 403 F. Supp. 1199 (E.D. Va. 1974), *aff'd mem.*, 425 U.S. 901 (1976).

206. 729 F.2d 1270 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 105 S. Ct. 1858 (1985). See *supra* notes 163–79 and accompanying text.

207. OKLA. STAT. ANN. tit. 70, § 6-103.15 (West 1979). For the pertinent text of § 6-103.15 see *supra* note 166.

208. *National Gay Task Force*, 729 F.2d at 1275.

209. 395 U.S. 444 (1969).

210. *National Gay Task Force*, 729 F.2d at 1274.

211. *Id.*

212. *Id.* at 1274–75.

213. *Id.* at 1273.

214. *Id.* at 1276 (Barrett, J., dissenting).

215. See *supra* note 23 and accompanying text. As noted earlier, the Tenth Circuit was automatically affirmed when the Supreme Court split evenly on the case. See *supra* notes 3–4 & 179 and accompanying text.

B. *Soldiers and Sailors*

An area of homosexual litigation which has received considerable public attention, but one in which the law is equally unclear, involves military personnel dismissed as a result of their sexual preference. Armed forces regulations concerning homosexuality are extensive and explicit and are required by Department of Defense Directives.²¹⁶ Prior to 1981, discretionary retention of homosexuals was permitted.²¹⁷ It was this discretion which was called into question in the cases of *Berg v. Clayton*²¹⁸ and *Matlovich v. Secretary of Air Force*.²¹⁹

The service record of Sergeant Matlovich showed that he had fought in Vietnam; had repeatedly volunteered for hazardous duty; had been wounded in a mine explosion; had earned a Purple Heart, two Air Force Commendation Medals, and the Bronze Star; and, had received the highest merit ratings possible from his superiors.²²⁰ Being aware of Air Force regulations prohibiting homosexuality, however, Matlovich wrote to the Secretary of the Air Force, advising him of his sexual preference and requesting that the regulations against homosexuality be waived in his case.²²¹

The Air Force's Administrative Discharge Commission investigated. Matlovich admitted to having had sexual relationships with two other Air Force men, neither of whom was under his command and one of whom had already been discharged. Based upon these facts the commission recommended that Matlovich be given a general discharge for unfitness. The secretary accepted the recommendation but elected to upgrade the discharge to honorable. Matlovich sought reinstatement to the military by appealing to the Air Force Board for the Correction of Military Records.²²² The appeal failed, and Matlovich took his case to the United States District Court for the District of Columbia.

The companion case to *Matlovich* as it wound its way through the federal courts was *Berg*.²²³ While stationed in Gaeta, Italy, Berg was accused by an enlisted man of attempting to commit a homosexual act. The Navy's Administrative Discharge Board, following an investiga-

216. Department of Defense Directives 1332.14 and 1332.30 establish the criteria for the Armed Forces generally. See, e.g., Army Reg. 635-100.

217. See *Watkins v. United States Army*, 721 F.2d 687, 689 (9th Cir. 1983); *Champagne v. Schlesinger* 506 F.2d 979, 984 (7th Cir. 1974).

218. 436 F. Supp.76 (D.D.C. 1977), *vacated and remanded*, 591 F.2d 849 (D.C. Cir. 1978).

219. 414 F. Supp. 690 (D.D.C. 1976), *vacated and remanded*, 591 F.2d 849 (D.C. Cir. 1978).

220. *Matlovich*, 591 F.2d at 854 n.4.

221. *Id.* at 853.

222. *Id.* at 854.

223. 591 F.2d 849.

tion, concluded that Berg had in fact committed the alleged act. Berg initially received a less-than-honorable discharge which was shortly thereafter upgraded to honorable. Upon being discharged, Berg brought suit in the United States District Court for the District of Columbia.²²⁴

Both cases were heard by Judge Gerhard Gesell, and both plaintiffs lost. Judge Gesell reasoned in *Berg* that (1) *Doe v. Commonwealth's Attorney*²²⁵ serves to exclude the right to privacy as between consenting adult homosexuals;²²⁶ (2) morale serves as a rational basis for the Navy in removing homosexuals from the military;²²⁷ (3) plaintiff was not entitled to a due process hearing before being discharged;²²⁸ and (4) the secretary had not abused his discretion.²²⁹

Berg and Matlovich appealed to the United States Court of Appeals for the District of Columbia where, late in 1978, each won at least a battle, if not the war.²³⁰ Based on a principle of administrative law, the court of appeals ruled that the secretary in each branch must state the grounds upon which he exercises his discretion.²³¹ In neither *Matlovich* nor *Berg*, said the court, was it possible to tell on what grounds the service had refused to make exceptions—that is, how it distinguished these cases from those in which homosexuals had been retained.²³² The court remanded the cases to the Navy and Air Force for explanations. Subsequently, the district court found that there was a lack of adequate standards for deciding which homosexuals to retain,

224. *Berg*, 436 F. Supp. 76.

225. 425 U.S. 901 (1976).

226. 436 F. Supp. at 79.

227. *Id.* at 80. The court accepted the Navy's contention that enlisted personnel would react to a homosexual officer in a manner which would destroy his credibility and render him ineffective as a leader. *Id.*

228. *Id.* The court recognized the general principle that the government may not permanently deprive a person of employment without first granting that person a due process hearing to determine whether the requisite conditions exist which warrant the deprivation. *Id.* at 81 n.3. However, the court concluded that this due process right was not triggered in the case of Ensign Berg since he had already admitted that he had engaged in homosexual acts and thereby conclusively established the validity of the grounds for his discharge under applicable Navy regulations. *Id.* at 80.

229. *Id.* at 81. Judge Gesell went on to commend the Navy for upgrading Berg's discharge. *Id.* at 83.

230. *Berg*, 591 F.2d at 851.

231. *Matlovich*, 591 F.2d at 859-61. Since the Navy and Air Force had been discretionary in discharging homosexuals, they were required to cite more than mere regulations as authority for exercising their discretion to discharge plaintiffs. *Id.* at 859-61.

232. *Id.* at 851. Civilians working in the Defense Department or engaged in national security appear to be protected by the government's obligation to establish a rational basis for discharging or refusing to hire a homosexual. See *Gayer v. Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973), *clarified*, 494 F.2d 1135 (D.C. Cir. 1974).

and ordered the individuals in question reinstated.²³³

In response to this adverse decision, the Department of Defense promulgated new regulations designed to eliminate the broad discretionary language, and to narrow the circumstances under which an individual who has engaged in homosexual acts may be retained in the service.²³⁴ The current thrust of military regulations on homosexuality is to remove all discretion. These regulations, which mandate discharge of homosexuals, have withstood constitutional challenges.²³⁵

In *Beller v. Middendorf*,²³⁶ the Ninth Circuit Court of Appeals upheld the Navy's discharge of three service members, concluding that the Navy's interest outweighed any solicitude toward consensual, private, homosexual conduct.²³⁷ The court, accepting the Navy's contention that homosexuals are military liabilities, outlined four reasons which would serve to sustain the regulation: (1) preservation of the fabric of military life; (2) preservation of the integrity of the recruiting process; (3) maintenance of discipline; and (4) acceptance of the men and women stationed in foreign countries.²³⁸

In *Rich v. Secretary of the Army*,²³⁹ the court found that the reasons articulated in *Beller* justified the Army's regulations on homosexuality.²⁴⁰ The court further found that Rich had misrepresented his homosexuality during enlistment; thus, even though he had not engaged in homosexual acts, the Army was justified in following its regulations by discharging him.²⁴¹ The court noted that even if privacy interests were involved, they would be outweighed by the compelling governmental interest in preventing homosexuality in the military.²⁴² Rich's claim that his first amendment rights of expression and association had been denied was rejected.²⁴³ Rich had not been discharged for advocating homosexuality, the court found, or merely for associating with homosexuals, but for falsely denying his homosexuality during enlistment. The effect on first amendment rights was held subordinate to the spe-

233. 23 Fair Empl. Prac. Cas. (BNA) 1251 (D.D.C. 1980).

234. D.O.D. Directive 1332.14, 32 C.F.R. pt. 41, app. A ¶ H (1984).

235. See *Watkins*, 721 F.2d at 689; Comment, *Employment Discrimination in the Armed Services—An Analysis of Recent Decisions Affecting Sexual Preference Discrimination in the Military*, 27 VILL. L. REV. 351, 360–61 n.58 (1981–1982). For a summary of the regulations' earlier history, see C. WILLIAMS & M. WEINBERG, *HOMOSEXUALS AND THE MILITARY* 24–29 (1971).

236. 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

237. *Id.* at 812.

238. *Id.* at 811.

239. 735 F.2d 1220 (10th Cir. 1984).

240. *Id.* at 1227.

241. *Id.* at 1229.

242. *Id.* at 1228.

243. *Id.* at 1229.

cial needs of the military.²⁴⁴

In *Matthews v. Marsh*,²⁴⁵ however, the United States District Court for Maine ruled that a ROTC cadet's statement to her instructor that the cadet was a homosexual was protected first amendment speech which could not be outweighed by any military interest.²⁴⁶ The rationale behind the Army's policies—an anticipated reaction by heterosexuals to homosexuals in their midst—was held insufficient to foreclose a service person's first amendment rights.²⁴⁷ The court concluded that, while the Army could constitutionally prohibit homosexual conduct, it must develop more narrowly drawn measures when dealing with first amendment interests of self-expression.²⁴⁸

The rule in *Beller*, although based entirely on the reaction of other service personnel to homosexuals amongst their ranks,²⁴⁹ and although roundly criticized in *Matthews*,²⁵⁰ has generally been upheld.²⁵¹ If the question were the propriety of excluding black soldiers because of the feared reaction of whites—an argument raised by the Army in resisting desegregation in the 1940's²⁵²—the answer would be that blacks must be admitted and the Army must control the reaction through discipline and discretion.²⁵³ Although the analogy is imperfect (since race is a constitutionally suspect class) the military interest—to avoid disruptive reactions—is comparable.²⁵⁴

VII. THE LAW IN LIMBO: LIBERTY AND THE SEARCH FOR RATIONAL BASES

Thus the law regarding homosexual rights remains in a state of flux and conflict, and the uncertainty extends well beyond the classroom or the military cases. Some courts would overturn the dismissal of

244. *Id.*

245. No. 82-0216 P32 (D.C. Me. Apr. 3, 1984), *appeal docketed*, No. 82-0216 (1st Cir. 1984).

246. *Matthews*, No. 82-0216 P32, slip op. at 39-40.

247. *Id.* at 40.

248. *Id.*

249. *Beller*, 632 F.2d at 811-12.

250. *Matthews*, No. 82-0216 P32. Most of the criticism was in regard to first amendment violations.

251. See, e.g., *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981). See *supra* notes 239-44 and accompanying text.

252. See Kenworthy, *The Case against Army Segregation*, 275 ANNALS 27 (1951). See generally M. MCGREGOR, *INTEGRATION OF THE ARMED FORCES 1940-1965* (1981).

253. *Matthews*, No. 82-0216 P32, slip op. at 38 n.41; *benShalom v. Secretary of Army*, 489 F. Supp. 964, 976 (E.D. Wis. 1980) (fear or racial and sexual tension kept the participation of black and female soldiers to a minimum—the vital mission of the Army has withstood these changes in racial and heterosexual activity, it should be able to withstand a change in homosexual activity).

254. *Matthews*, No. 82-0216 P32, slip op. at 38 n.41.

a homosexual who has publicly stated his views as a violation of the first amendment's guarantee of free speech,²⁵⁵ while others have allowed employers to fire homosexuals and thereby avoid "tacit approval of this socially repugnant concept."²⁵⁶ Some courts would treat revocation of a homosexual bar's liquor license as a violation of the fourteenth amendment's equal protection clause,²⁵⁷ while others have reached the opposite conclusion.²⁵⁸ Some courts would hold that the ninth amendment's implicit right of privacy prohibits antisodomy laws as they apply to consenting adults,²⁵⁹ while others have limited that right to married couples.²⁶⁰ And some courts would allow a homophile organization the freedom to associate,²⁶¹ while others have not.²⁶²

If a homosexual act were viewed as "natural" and harmless, the state could not justly punish it. Likewise, if homosexuals were perceived as victims of a self-contained sickness, the state could no more penalize them than it could discriminate against dwarfs, albinos, or fat people.²⁶³ But few judges have found homosexuality to be "natural" and harmless. To the contrary, many courts seem to treat the condition as a sin or a communicable disease—as either an act or a condition—and as such they deem homosexuality to have a broadly deleterious effect. A society may impose certain limitations upon an offensive agent under the same justification by which it may quarantine lepers, but such restriction must be balanced against equally weighty principles of civil liberties—the right to be free from unwarranted governmental intrusion.

The principle that should be applied is this: any law is unwarranted which discriminates against an individual or group whose unpopular ideas or offensive practices are not *imposed* upon others

255. See *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974). See *supra* notes 195–201 and accompanying text.

256. *McConnell v. Anderson*, 451 F.2d 193, 196 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972). See generally Wein & Remmers, *Employment Protection and Gender Dysphoria: Legal Definitions of Unequal Treatment on the Basis of Sex and Disability*, 30 HASTINGS L.J. 1075 (1979).

257. *Kerma Restaurant Corp. v. State Liquor Auth.*, 21 N.Y.2d 111, 233 N.E.2d 833, 286 N.Y.S.2d 822 (1967).

258. See *Francisco Enters., Inc. v. Kirby*, 482 F.2d 481 (9th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).

259. *State v. Bateman*, 113 Ariz. 107, 547 P.2d 6, *cert. denied*, 429 U.S. 864 (1976). See *supra* text accompanying notes 40–88.

260. See *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). See *supra* note 66 and accompanying text.

261. See, e.g., *Gay Students Org. v. Bonner*, 509 F.2d 652 (1st Cir. 1974).

262. See, e.g., *Gay Lib v. University of Mo.*, 416 F. Supp. 1350 (W.D. Mo. 1976), *rev'd*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).

263. See *Richards*, *supra* note 9.

against their will²⁶⁴ nor shown to have a *deleterious effect*.

American democracy is based upon the theory of natural rights²⁶⁵ that was propounded by Thomas Hobbes and John Locke, and later synthesized by John Stuart Mill. Hobbes developed the notion of a social contract between the people and the state, together with the idea of the absoluteness of sovereignty.²⁶⁶ Locke formulated the social contract in such a way as to establish the ultimate supremacy of the people over the government. Laws of nature, according to Locke, impel men to voluntary respect for certain primary rights of others.²⁶⁷

The Framers of the American democracy regarded the security of individual freedom as essential to governmental success, and sought to assure such liberty by way of checks and balances, and by verbalizing certain "natural" and "inalienable" rights.²⁶⁸ Thomas Paine felt that these inalienable rights included

all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation some natural right²⁶⁹

But it has been difficult to formulate a precise and comprehensive catalogue of the rights of men. (Thus we have the ninth amendment, that a constitutional enumeration of certain rights "shall not be construed to deny or disparage others retained by the people.") Various theorists, also, have attempted the task by distinguishing natural rights—those already in existence in the statute of nature—from civil rights—those dependent upon membership in society. The former were absolute, because they involved only personal interests. The latter affected other people, and therefore were subject to control by government. But the distinction has always met with great practical difficulties, such as when Mill argued that laws requiring Sabbath-observance offended individual rights, but that state control of family size did not.²⁷⁰

Mill's theory of liberty rests on two principles:

(1) All restraint . . . is an evil . . . leaving people to themselves is always better . . . than controlling them; and

264. See *infra* notes 275-84 and accompanying text.

265. See E. GERHARDT, *AMERICAN LIBERTY AND "NATURAL LAW"* 149 (1953).

266. See F. COKER, *READINGS IN POLITICAL PHILOSOPHY* 675 (1938).

267. *Id.* at 528-29.

268. See E. GERHARDT, *supra* note 265, at 57, 103.

269. F. COKER, *supra* note 266, at 675.

270. See O. HANDLIN & M. HANDLIN, *THE DIMENSIONS OF LIBERTY* 61 (1961).

(2) The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the purpose for which power can rightfully [be] exercised over any number of a civilized community, against his will, is to prevent harm to others.²⁷¹

The first principle Mill deemed to be a self-evident truth, and few Americans would argue with it. The second, while equally noble and high-minded, is much more difficult to apply. Is it possible, after all, to categorize laws into those which are warranted as preventing harm to others and those which are not? Can there be any such thing as a truly victimless crime?

The ultimate issue in any system of government based upon natural law is, who will be that law's exponent? Americans have chosen to delegate this power to the Supreme Court, which has defined, restricted, and extended many "natural" and constitutional rights.²⁷² Thus the "imposition-effect" test, as refined by Mill and applied by civil libertarians, is not an alternative to the rational basis standard or others formulated by the Court, but merely a reflection of the natural law upon which those standards are constitutionally based. What has remained constant is not the content of the rights, but the conception of them.²⁷³

The Founding Fathers clearly felt that in certain areas opportunities for unwarranted intervention were troublesome enough to require a Bill of Rights. We are thus protected against laws which would inhibit speech or religion or which would permit unreasonable searches and seizures. Because the freedom of sexual preference is not specifically guaranteed, however, the question remains: to what extent may homosexuality be legitimately restricted under the law's power to establish a "moral" society, that is to say, to what extent does homosexuality adversely affect the social fabric?²⁷⁴

More specifically, can any sexual conduct between consenting adults be viewed as harmful to others?²⁷⁵ If one's sensibilities are offended merely by the *thoughts* of such acts, a law prohibiting the acts would not decrease the thoughts.²⁷⁶ For both proponents and opponents

271. P. RADCLIFF, *LIMITS OF LIBERTY: STUDIES OF MILL'S ON LIBERTY* 83 (1966).

272. See O. HANDLIN & M. HANDLIN, *supra* note 270, at 62-63.

273. *Id.* at 64. See also *supra* notes 22-23 and accompanying text.

274. The Supreme Court frequently has justified the state's right to a kind of moral paternalism. See, e.g., *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) ("the right to the Nation and of the States to maintain a decent society," or, more particularly, the government's right to base its antiobscenity laws on "unprovable assumptions" about what is good for the people, *id.* at 63).

275. See Comment, *supra* note 25, at 596.

276. *Id.* A person who is disgusted by even the thought of persons engaging in certain acts

of legal restrictions, it is the proof or disproof of a deleterious effect which creates the most difficulty.²⁷⁷ The traditional argument of those who would favor restriction (and one with which the author sympathizes on aesthetic and moral grounds) is that homosexual acts are "unnatural." But as Mills observed: "The demand that all other people shall resemble ourselves grows by what it feeds on. If resistance waits till life is reduced *nearly* to one uniform type, all deviations from that type will come to be considered impious, immoral, even monstrous and contrary to nature."²⁷⁸

Even assuming that consensual adult homosexual acts are "unnatural," it is not self-evident that they harm anyone. It is more likely the *thoughts* of the acts which generate disgust.²⁷⁹ There should always be limitations on the community's power over individuals with regard to harms which exist primarily in the mind of the beholder.²⁸⁰ The Supreme Court has said that "the Constitution leaves matters of taste and style . . . largely to the individual."²⁸¹ In *O'Connor v. Donaldson*,²⁸² the Court considered whether the state may confine individuals involuntarily if they are of no danger to themselves or to others, and concluded that the state may not

fence in the harmlessly mentally ill solely to save its citizens from exposure to those whose ways are different One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.²⁸³

Likewise, the argument is strong that majoritarian intolerance, animosity, or prejudice should not be allowed to justify the regulation of sexual activity which is considered distasteful.²⁸⁴

Another argument in favor of restriction is that homosexual acts cannot produce progeny. But in an age of overpopulation and thermo-

could still be disgusted by those thoughts even if the law succeeded in preventing the acts from occurring.

277. The problematic question remains: Who is harmed by homosexuality and how is the injury manifested? *Id.* at 597.

278. Mills, *On Liberty*, in *THE UTILITARIANS* 551 (1961).

279. Comment, *supra* note 25, at 597.

280. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-3, at 894-96 (1978). See also Comment, *supra* note 8, at 842.

281. *Cohen v. California*, 403 U.S. 15, 25 (1971).

282. 422 U.S. 563 (1975).

283. *Id.* at 575.

284. Comment, *supra* note 8, at 843. See also *benShalom v. Secretary of Army*, 489 F. Supp. 964, 976 (social judgments of homosexuals as displeasing, disgusting, or immoral are not ingredients for gauging constitutional permissibility).

nuclear weapons, it is easy to find a rational state basis for sanctioning family planning.²⁸⁵ If we legislatively recognize homosexuality as sinful, needn't we legislatively embrace the Biblical injunction to be fruitful and multiply and, therefore, outlaw contraception as well?

It would appear that proof of an adverse effect should be necessary to find a rational basis upon which discriminatory legislation must be grounded. Yet it is equally apparent that no causal connection has been empirically and universally demonstrated between an individual's homosexuality and his or her ability to be a good employee or useful citizen. There is no substantial evidence that homosexuals are more involved than heterosexuals in offenses against the young,²⁸⁶ that they are more violent or prone to disease,²⁸⁷ that laws against sodomy inhibit children from becoming homosexuals,²⁸⁸ or that such laws have a healthy effect on heterosexual marriages.²⁸⁹ On the other hand, the more that homosexuals feel free to declare themselves, the more tenuous becomes the argument that the avoidance of opportunities for blackmail is a rational basis for discrimination.²⁹⁰

In short, promiscuity and homosexuality could in many cases be defended as affecting no one but the participating parties. Were the pressures of law and public opinion relaxed, however, there might well be serious consequences for family life and the social structure, which on the whole we may wish to preserve.²⁹¹ Thus the rights of homosexuals must often still be decided on a case-by-case basis as must similarly troublesome problems involving pornography, polygamy, and prostitution.

In cases involving homosexuality, answers to the two critical inquiries—Is there an imposition? Is there a deleterious effect?—must come from the Supreme Court, relying as it does on a current interpretation of natural rights as guaranteed or limited by the Constitution.²⁹²

285. Comment, *supra* note 25, at 597.

286. Richards, *supra* note 9, at 1334.

287. *Id.* at 1335. *But see id.* at 1327 n.247.

288. *Id.* at 1334-35.

289. *Id.* at 1341. To the contrary, legal heterosexual relations outside marriage probably contribute as much if not more to the breakdown of the nuclear family. *See also* *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

290. *See* Geis, *Reported Consequences of Decriminalization of Consensual Adult Homosexuality in Seven States*, 1 J. HOMOSEXUALITY 419 (1976).

291. *See* P. RADCLIFF, *supra* note 271, at 85.

292. Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 22-23 (1978). It is important to note that this characterization of a "natural law" basis for Supreme Court reasoning is purposefully circumspect. As Professor Ely points out, a slavish insistence on natural law justifications is highly problematic—as are the other frequently cited theories of "neutral principles," "reason," "tradition," and "consensus." He ends with a sympathetic reading of Alexander Bickel's conclusion: if the proper role of the Supreme Court is the definition and imposition of values, the

With respect to homosexual rights in general, though, it seems that the "imposition-effect" test would be hard to satisfy if the Court were to follow its reasoning in *Stanley v. Georgia*²⁹³ to its logical end. Under the rationale of *Stanley*, governmental regulation of homosexual acts within the home is a likely violation of the right to privacy.

The line to be drawn is the traditional balance between private rights and public welfare. If, for example, the argument is accepted that cigarette smokers should be restricted only when they physically annoy or endanger their nonsmoking neighbors, then, similarly, only when homosexuals engage in offensive conduct by force or in public should they be penalized. Strict libertarian doctrine would suggest that even unimposed *public* acts of homosexuality should be permitted, on the same reasoning that one is not obliged to view obscene films,²⁹⁴ and, moreover, that *all* of the so-called "victimless crimes" should be legalized unless it can be proven they have a deleterious effect.²⁹⁵ Of course, the difficulty in proving or denying that effect is the primary reason for the continuing debate among lawyers, legislators, and libertarians regarding homosexual rights.

VIII. CONCLUSION

The subject of civil liberties for homosexuals is inevitably an emotional one, about which numerous lower courts appear to be in conflict. To date the Supreme Court has declined to make a definitive statement.²⁹⁶ Until and unless it does, the law in most jurisdictions remains unfair and confusing, in flux and in limbo. In addition to the various criminal sanctions available, homosexuals in America may be and are legally discriminated against.

The proposition that in a free society this should be the state of affairs is doubtful but one whose refutation lends itself to no easy proofs. Since there is little clear evidence that homosexual conduct has a harmful effect on nonparticipants,²⁹⁷ the only interest to be safeguarded is a moral one.²⁹⁸ While we may like to think that each of our

observer "might well after a lifetime of searching conclude that since nothing else works—since there isn't any impersonal value source out there waiting to be tapped—one might just as well 'do the right thing' by imposing one's own values." *Id.* at 55.

293. 394 U.S. 557 (1969). See *supra* notes 48–49 and accompanying text.

294. Richards, *supra* note 9, at 1344–45 n.331.

295. *Id.* at 1347–48, n.340.

296. See *supra* notes 3–4 and accompanying text.

297. W. BARNETT, *supra* note 34, at 100 n.2; Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 406 (1963); Sartorius, *The Enforcement of Morality*, 81 YALE L.J. 891, 893 (1971).

298. See Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967); Comment, *supra* note 25. There are numerous, well-articulated debates among legal scholars about the proper relationship between law and morality. Lord Devlin, perhaps the most

laws has a moral basis, we also pride ourselves on the idea that it is anathema for the state to impose theological values²⁹⁹ upon people whose contrary conduct causes no injury to others.³⁰⁰

As much as we might agree with the substance and high-mindedness of the moral majority, "there remains a realm of private morality which is . . . not the law's business."³⁰¹

quoted advocate of society's right to prevent immorality through law, argues that a set of shared moral values is essential to a healthy society, and the violation of a shared value, even if in private, threatens that health. He also asserts that a generally held conviction that certain activity is wrong justifies a law against it. *See* Comment, *supra* note 94, at 581 n.147 (citing Sartorius, *supra* note 297, at 892-93). *See also supra* notes 61-65 and accompanying text. *But see* W. BARNETT, *supra* note 34, at 104; H. HART, LAW, LIBERTY, AND MORALITY (1963).

299. *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 942, 434 N.Y.S.2d 947, 953 (1980), *cert. denied*, 451 U.S. 987 (1981).

300. *Commonwealth v. Bonadio*, 490 Pa. 91, 97, 451 A.2d 47, 50 (1980).

301. REPORT OF THE COMM. ON HOMOSEXUAL OFFENSES AND PROSTITUTION ¶ 62 (1963) (Wolfenden Report, England).